UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SOLARCITY CORPORATION,

and Case 32-CA-128085

ANITA BETH IRVING, an Individual

David Reeves, Esq. for the General Counsel.
Nicole A. Buffalano, Esq.
(Morgan, Lewis & Bockius, LLP)
for the Respondent.

DECISION

Statement of the Case

KENNETH W. CHU, Administrative Law Judge. This case is before me on the parties' January 22, 2015 joint motion to waive the hearing and to submit case on joint stipulation of facts pursuant to Section 102.35(a)(9) of the National Labor Relations Board (NLRB or the Board).[1] I granted the joint motion on January 26, 2015. The General Counsel and the Respondent filed timely briefs on March 2, 2015.

Stipulated Issues

The amended charge was filed on June 4, 2014[2] and the amended complaint was issued on November 4 (Jt. Exhs. 3 and 7).[3] The parties stipulated to the following issues to be resolved

1. Whether the Respondent's mandatory Arbitration Agreement and the Revised Arbitration Agreement executed by Charging Party Anita Beth Irving (Irving) and all other California employees as a condition of their employment violated Section 8(a)(1) of the National Labor Relations Act (Act) under the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F. 3d.344 (5th Cir. 2013) and *Murphy Oil USA, Inc*, 361 NLRB No. 72 (2014) because the Arbitration Agreement and/or Revised Arbitration Agreement interfere with employees' Section 7 right (of the Act) to engage in class and collective action.

2. Whether Respondent violated Section 8(a)(1) of the Act for the reasons stated in the preceding paragraph by maintaining and retaining the option, under the written terms of the Arbitration Agreement and/or Revised Arbitration Agreement to enforce the Arbitration

[1] Hereinafter, the "Stipulation."
[2] All dates are 2014 unless otherwise indicated.
[3] "Jt. Exh." is identified for joint exhibit; "GC Br." for the General Counsel's brief and "R Br." for the Respondent's brief.

Agreement and/or Revised Arbitration Agreement if violated, as to all of its California employees.

3. Whether Respondent violated Section 8(a)(1) of the Act by interfering with employees' access to the Board and its processes by maintaining language in paragraph 12(A) of the Arbitration Agreement and/or paragraphs 12(A)(1)(4) and (5) of the Revised Arbitration Agreement which employees could reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

4. Whether Respondent violated Section 8(a)(1) of the Act by seeking to enforce the Arbitration Agreement against Charging Party by its court filings in Case No. CIV 525975.[4]

On the joint stipulation of facts submitted by the parties, the joint exhibits attached to the joint stipulation and after considering the briefs filed by the General Counsel and Respondent,[5] I make the following

Stipulated Facts

I. Jurisdiction

The parties stipulated that the Respondent is a Delaware corporation with an office and place of business in San Mateo, California, and has been engaged in the solar energy industry. The Respondent admits and I find that at all material times it has been an employer engage in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. Statement of Stipulated Facts

The parties stipulated to the following statement of facts:

1. Since at least November 6, 2013 and continuing to or about March 11, the Respondent has promulgated and maintained to its employees employed in the State of California (California employees), including the Charging Party, and has required them to execute as a condition of employment, an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (the Arbitration Agreement). The Arbitration Agreement specifically informs Respondent's California employees that they are bound to the Arbitration Agreement as a condition of their employment with Respondent.

2. The Charging Party was hired by Respondent in November 2012. On November 14, 2012, the Charging Party was required to sign and thereby enter into the Arbitration Agreement as a condition of employment.

3. Since November 6, 2013[6] and continuing to date, the Respondent has maintained the Arbitration Agreement and has the option, under the written terms of the Arbitration Agreement to enforce the Arbitration Agreement if violated, as to all of its California employees, including the Charging Party, who were hired before about March 11, 2014.

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[4] Stipulation at 5, 6.

[5] The Charging Party elected not to file a statement of position.

[6] Since Irving executed the Arbitration Agreement on November 14, 2012, it is clear that the Respondent has maintained the Arbitration Agreement *prior* to November 6, 2013.

4. On or around March 11, 2014, the Respondent revised its Arbitration Agreement (Revised Arbitration Agreement). Since that time, newly hired California employees have signed and Respondent has maintained as a condition of employment, as to those employees, the Revised Arbitration Agreement. The Revised Arbitration Agreement specifically informs the Respondent's California employees that they are bound to the Arbitration Agreement as a condition of their employment with Respondent.

5. Since around March 11, 2014, Respondent has maintained the Revised Arbitration Agreement and has the option, under the written terms of the Revised Arbitration Agreement to enforce the Revised Arbitration Agreement if violated, as to those employees that were hired after about March 11, 2014.

6. On or about December 24, 2013, the Charging Party filed a class action complaint against Respondent in the Superior Court of the State of California in and for the County of San Mateo in Case No. CIV 525975 alleging state wage and hour violations (Jt. Exh. 11). On or about April 1, 2014, the Respondent sought enforcement of the Arbitration Agreement against the Charging Party by filing a Notice of Petition and Petition to Compel Arbitration on an Individual Basis and Motion to Dismiss or in the Alternative to Stay the Action Pending Arbitration in Case No. CIV 525975 (Jt. Exh. 12).

III. Arbitration and Revised Arbitration Agreements

At all material times, the Arbitration Agreement (Jt. Exh. 10)[7] has included the following language

> 12. *Arbitration*
>
> A. This Agreement applies to any dispute arising out of or related to Employee's employment, including termination of employment, with the Company or one of its affiliates, subsidiaries or parent companies. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. The Agreement also applies, without limitations, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding Workers compensation, state disability insurance and unemployment insurance claims).

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[7] The Arbitration Agreement was inadvertently marked as Jt. Exh. 9. The Arbitration Agreement is attached to the Stipulation as Jt. Exh. 10. The Revised Arbitration Agreement is at Jt. Exh. 9.

D. In arbitration, the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by the forum state's procedural rules applicable to court litigation as interpreted and applied by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action **("Class Action Waiver"),** or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought on behalf of a class of persons or the general public. Although an Employee will not be retaliated against, disciplined, threatened with discipline as a result of his or her filing of or participation in a class or collective action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims.

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H. This Agreement is the full and complete agreement relating to the formal resolution of employment-related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and the Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class and/or collective action in arbitration.

At all material times, the Revised Arbitration Agreement (Jt. Exh. 9) has included the following language

12. *Arbitration*. In consideration of my employment with the Company, its promise to arbitrate all disputes with me, and my receipt of compensation and benefits provided to me by the Company, at present and in the future, the Company and I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration, and not by way of court or jury trial, except as otherwise provided herein or to the extent prohibited by applicable law. I acknowledge that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq., and evidences a transaction involving commerce.

A. *Scope of Arbitration Agreement*

(1) Disputes which the Company and I agree to arbitrate include, without limitation, disputes arising out of or relating to interpretation or application of this Agreement, disputes regarding my employment with the Company or its affiliates (or termination thereof), trade secrets, unfair competition, compensation, meal and rest periods, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers'

compensation, state disability insurance and unemployment insurance claims) Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration.

(2) By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law. Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, representative, or private attorney general proceeding, including without limitation pending but not certified class actions ("Class Action Waiver"). I understand and acknowledge that this Agreement affects my ability to participate in class, collective, or representative actions.

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(4) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, the Company agrees not to retaliate, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing in a class, collective or representative action in any forum.

(5) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute (including, by way of example, claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203)); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. However, I expressly acknowledge and agree that such permitted agency claims do not include claims under California Labor Code Section 98 et seq. with the California Labor Commissioner or Division of Labor Standards Enforcement **("DLSE") —** such DLSE claims must be arbitrated in accordance with the provision of this Agreement.

IV. The Positions of the Parties

The General Counsel contends that the Respondent's maintenance of the Arbitration Agreement and the Revised Arbitration Agreement violates Section 8(a)(1) of the Act, consistent

with *D.R. Horton, Inc.* and *Murphy Oil, USA, Inc.* in that they prohibit employees from initiating or pursuing class or collective actions in any forum. The General Counsel further asserts that the agreements may be reasonably interpreted by employees as precluding their right to file unfair labor practices charges with the NLRB and thus tends to chill employees in the exercise of the Section 7 rights. Finally, the General Counsel argues that the Respondent further violated Section (8(a)(1) of the Act by filing its petition to compel enforcement of the Arbitration Agreement and Revised Arbitration Agreement against the Charging Party.

The Respondent argues that *D.R. Horton* and *Murphy Oil* are incorrect as a matter of law and that I should not follow the Board's decisions. The Respondent further contends that the arbitration agreements explicitly allow employees to file charges with the Board and to participate in Board proceedings. Finally, the Respondent maintains that the complaint is barred by Section 10(b) of the Act because the underlying charge was filed more than 18 months after the Charging Party signed the arbitration agreement in question.

ANALYSIS AND CONCLUSIONS

a. The Respondent's 10(b) Argument

I will first address the Respondent's 10(b) argument. Section 10(b) of the Act provides that "no complaint shall be issue based upon on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

The Respondent contends that Section 10(b) bars the General Counsel from pursuing this complaint inasmuch as the charge was filed on May 5, 2014, more than 6 months after Irving signed the Arbitration Agreement on November 14, 2012. It is not disputed that Irving filed her charge more than 6 months after executing the Arbitration Agreement.

However, the Board has long recognized that Section 10(b) does not bar an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period. More specifically, Section 10(b) does not preclude a complaint allegation based on the maintenance of a facially invalid rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier and has not been enforced, since "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000); See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

The Board recently rejected the Respondent's argument that the complaint is time barred under Section 10(b) of the Act. In *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015), the Charging Party signed a compensation schedule agreement more than 6 months before the initial unfair labor practice charge was filed and served. The Board held that, "What matters, rather, is that the Respondent maintained and enforced the compensation schedule during the 10(b) period." Here, the parties stipulated that "Since at least November 6, 2013, and continuing to around March 11, 2014, the Respondent has promulgated to its employees…including the Charging Party…and has required them to sign as a condition of employment…the Arbitration Agreement."

I find that this time span includes the relevant 6-month period that preceded the filing of the charge on May 5, 2014. In *Cellular Sales,* 362 NLRB No. 27 at 2,

The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated. It is equally well established that an employer's enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1). The complaint was timely in this respect, as well.

Accordingly, I find and conclude that Section 10(b) does not bar the instant complaint.

b. Whether the Respondent's Mandatory Arbitration Agreement and Revised Arbitration Agreement Violate Section 8(a)(1) of the Act

The evidence establishes that the Arbitration Agreement and Revised Arbitration Agreement require Respondent's employees to waive any right to pursue class or collective claims pertinent to their employment, in any forum. After limiting the forum for resolution of disputes between the employee and the Respondent to arbitration, the Arbitration Agreement provides employees with the following,

> …there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action **("Class Action Waiver"),** or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

The Revised Arbitration Agreement states that employees,

> …agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law. Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, representative, or private attorney general proceeding, including without limitation pending but not certified class actions **("Class Action Waiver")**.

By requiring that employees waive their right to pursue claims collectively in any forum, the Arbitration and Revised Arbitration agreements violate Section 8(a)(1) of the Act, pursuant to *D.R. Horton,* 357 NLRB No. 184 at 12-13. In *D.R. Horton*, the Board held that class or collective legal action on the part of employees, regardless of the particular forum involved, is a form of activity "at the core of what Congress intended to protect by adopting the broad language of Section 7," and is therefore "central to the Act's purposes." *D.R. Horton*, 357 NLRB No. 184 at p. 3. As a result, the Board held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation and employment claims in *all* forums, arbitral and judicial." *D.R. Horton*, 357 NLRB No. 184 at 12 (emphasis in original). Because the two arbitration agreements preclude the Respondent's employees from initiating or pursuing any class or collective claim in any forum, the Respondent's maintenance and enforcement of the Arbitration Agreement and Revised Arbitration Agreement violates Section 8(a)(1), as alleged in the complaint.

The Respondent's arguments regarding the legal infirmity of the Board's *D.R. Horton* decision must be addressed to the Board and not to the Administrative Law Judge. It is well-

settled that the Board generally applies a "non-acquiescence policy" with respect to contrary views of the Federal Courts of Appeal. *See D.L. Baker, Inc.*, 351 NLRB 515, 529, fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378, n. 1 (2004). Thus, the Administrative Law Judge is required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, 342 NLRB at 378, n. 1; see also *Gas Spring Co.*, 296 NLRB 84, 97-98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Although Respondent contends that the Supreme Court's decision in *ATT Mobility v. Concepcion,* 131 S.Ct. 1740 (2011) obviates the legal viability of *D.R. Horton and Murphy Oil*, the Board in *D.R. Horton* considered and distinguished that opinion given the number and scope of the contracts involved, and the conflict between the Federal Arbitration Act and state law at issue in the Supreme Court case. *D.R. Horton*, 357 NLRB No. 184, at p. 11-12, discussing *AT&T Mobility v. Concepcion*, 130 S.Ct. at 1748, 1750-1752. In *Cellular Sales*, 362 NLRB No. 27 at 1, a case decided after *D.R. Horton* and *Murphy Oil*, the Board reaffirmed its position and agreed with the administrative law judge that the respondent violated Section 8(a)(1) of the Act "…by maintaining and enforcing a mandatory and binding arbitration policy…that waives the rights of employees to maintain class or collective actions in all forums, whether arbitral or judicial."

The Supreme Court decisions cited by the Respondent as requiring a "contrary Congressional command" in order to forego enforcement of an otherwise valid arbitration agreement do not explicitly overrule the Board's *D.R. Horton* and *Murphy Oil* decisions. *Compucredit Corp. v. Greenwood*, --- U.S. ---,132 S.Ct. 665, 668-669 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---,133 S.Ct. 2304, 2309 (2013). As a result, the Respondent's argument that the arbitration policy lawfully precludes class or collective legal actions because no "contrary Congressional command" requires that a waiver be rejected is also appropriately addressed solely to the Board itself.[8]

The Respondent also points out that the Fifth Circuit when deciding the Petition for Review of *D.R. Horton* refused to enforce the portion of the Board's decision and order finding that an arbitration agreement which eliminated the right to initiate and pursue class or collective claims violated Section 8(a)(1). *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 362. The Respondent notes that other Circuits addressing the issue have held that arbitration agreements requiring the waiver of class or collection actions do not violate Section 8(a)(1). See *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bistol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Regardless of this case law, as discussed above, an Administrative Law Judge is bound by the decisions of the Board, including *D.R. Horton*, until overturned by the Board or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB at 378, n. 1; *Waco, Inc.*, 273 NLRB 746, 749, n. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enf. granted in part, 331 F.2d 176 (8th Cir. 1964). Therefore, the Respondent's contentions based upon the decisions of the federal Courts of Appeal must also be directed to the Board.

For all of the foregoing reasons, I find that the Arbitration Agreement and the Revised Arbitration Agreement, by prohibiting the Respondent's employees from initiating or pursuing any class or collective claim in any forum, violate Section 8(a)(1) of the Act pursuant to the Board's decisions in *D.R. Horton*, *Murphy Oil* and *Cellular Sales*.

[8] To the extent that the Respondent cites to decisions of other Board Judges in support of its argument that the Board's holding in *D.R. Horton* and *Murphy Oil* is no longer tenable in light of the Supreme Court's decision in *American Express Co*., such decisions are not precedential and therefore, I decline to find that *D.R. Horton* is no longer effective.

c. Whether Employees could Reasonably Conclude that the Arbitration Agreement and the Revised Arbitration Agreement Prohibits or Restricts Their Right to File Unfair Labor Practice Charges with the Board

The General Counsel contends that the Respondent's arbitration policy violates Section 8(a)(1) of the Act in that it may reasonably be interpreted to preclude the filing of unfair labor practices charges and would therefore, tend to chill the employees' exercise of their rights under Section 7.

The Respondent argues that the arbitration agreements explicitly allow employees to file charges with the NLRB and an employee would not reasonably conclude that the language in the arbitration agreements prohibits or restricts his or her right to file unfair labor charges with the Board.

It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825. A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following (i) employees would "reasonably construe" the rule's language to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that the rules must be afforded a "reasonable" interpretation without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38 (2012) at p. 3; *Lafayette Park*, 326 NLRB at 828.

I find that employees would reasonably interpret the Respondent's Arbitration Agreement and Revised Arbitration Agreement as prohibiting them from filing unfair labor practice charges, and that the Respondent's maintenance of the agreements as a condition of employment therefore violates Section 8(a)(1). The arbitration agreements contain broad language regarding the scope of its applicability. The Arbitration Agreement states, in part,

> Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.

The Revised Arbitration Agreement states, in part,

> I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration, and not by way of court or jury trial, except as otherwise provided herein or to the extent prohibited by applicable law.

The Board has repeatedly held that sweeping language in defining the issues subject to solely arbitral resolution is reasonably interpreted by employees to encompass and prohibit the filing of unfair labor practice charges. See *Supply Technologies, LLC*, 359 NLRB No. 28 at p. 1-4 (agreement requiring that employees "bring any claim of any kind," including "claims relating to my application for employment, my employment, or the termination of my

employment" solely to employer's alternative dispute resolution program reasonably interpreted as prohibiting the filing of unfair labor practice charges); *2 Sisters Food Group*, 357 NLRB No. 168 at p. 1-2, (policy requiring that employees submit "all [employment] disputes and claims" to arbitration could be reasonably interpreted to preclude the filing of charges with the Board); *U-Haul Co. of California*, 347 NLRB at 377-378 (agreement requiring arbitration of "all disputes relating to or arising out of an employee's employment…or the termination of that employment," including "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" violated Section 8(a)(1)).

Thus, the provisions in the arbitration agreements require all employment-related disputes to be arbitrated as the exclusive means of resolution violate Section 8(a)(1) because employees would reasonably believe it waived or limited their rights to file Board charges or to access the Board's processes. See *Murphy Oil*, slip op. at 13, 19 fn 98, 39 fn. 15.

I further find that the language in the arbitration agreements providing that

> …this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute…or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor…

is insufficient to indicate to a reasonable employee that the agreements do not prohibit the filing of unfair labor practice charges with the Board. The language in both agreements explicitly excludes unfair labor practice charges filed with the National Labor Relations Board from the agreements' requirement that all employment-related claims be resolved in the context of arbitration. However, in the context of the reasonable interpretation analysis the Board has eschewed any assumption that employees have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language. For example, in *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 at p. 2, the Board found that language limiting the employer's policy to claims "that may be lawfully [] resolve[d] by arbitration" was not susceptible to the interpretation by "most nonlawyer employees," who would be unfamiliar with the Act's limitations on compulsory arbitration, that unfair labor practice charges were thereby excluded. Similarly, in *U-Haul Co. of California*, 347 NLRB at 377-378, the Board concluded that employees without legal training could not be reasonably expected to understand that language limiting arbitration to disputes or claims "but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement." This is particularly the case in light of the agreements' preceding language stating that arbitration applies "…to any dispute arising out of or related to Employee's employment…"

I note that the Board has found language explicitly referring to an employee's responsibility to "timely file any charge with the NLRB" is insufficient to clarify a broad mandatory grievance and arbitration policy such that the policy would not be reasonably interpreted to prohibit the filing of unfair labor practice charges in violation of Section 8(a)(1). *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007). The Board affirmed this longstanding precedent in *Cellular Sales*, 362 NLRB No. 27 at fn. 4, stating

> [t]he Board will find that a work rule that is required as a condition of employment, such as the arbitration policy in this case, violates Sec. 8(a)(1), if employees would reasonably believe the rule or policy interferes with their ability to file a Board charge or access to the Board's processes, *even if the rule or policy does not expressly prohibit access to the Board* (emphasis added). See *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), slip op. at 13, 19 fn. 98, 39 fn. 15*; D. R. Horton, Inc.,* 357 NLRB No. 184, slip op. at 2 fn. 2 (2011), enfd. in relevant part, 737 F.3d 344 (5th Cir. 2013); *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007) (unpublished decision); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

For all of the foregoing reasons, I find that employees would reasonably interpret the Arbitration Agreement and the Revised Arbitration Agreement as prohibiting the filing of unfair labor practice charges, and as a result, the Respondent's maintenance of the agreements as a condition of employment violated Section 8(a)(1).

d. Whether the Maintenance and Retention of the Option to Enforce the Arbitration Agreement and/or Revised Arbitration Agreement Violates Section 8(a)(1) of the Act

The General Counsel argues that the Respondent violated Section (a)(1) of the Act by maintaining and retaining language in the Arbitration and Revised Arbitration agreements to force compliance of the arbitration policy on the California employees. Subsumed in this issue is whether Respondent violated Section 8(a)(1) of the Act when it petitioned to compel arbitration on an individual basis and moved to dismiss or stay the class action in court filings in Case No. CIV 525975 on or about December 24, 2013 (Jt. Exh. 12).

As noted, language in the Arbitration Agreement states, in part, that the Respondent "…may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims." The Revised Arbitration Agreement also has similar language, stating that the Respondent "…may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims." On December 24, 2013, the Respondent filed its Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration (Jt. Exh. 12).

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740-744, 748 (1983), the Supreme Court, formulating an accommodation between employee Section 7 rights and the First Amendment right of parties to petition the government for redress of grievances, held that lawsuits motivated by a desire to retaliate against the exercise of Section 7 rights which lacked a reasonable basis in fact or law violated Section 8(a)(1) of the Act. The Supreme Court explicitly excluded from this analysis lawsuits filed with "an objective that is illegal under federal law." *Bill Johnson's Restaurants*, 461 U.S. at 737-738, fn. 5. In such cases, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3rd Cir. 1992).

Subsequently, in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 529-530 (2002), the Court invalidated the Board's rule that an unsuccessful lawsuit filed for retaliatory reasons violated the Act even if reasonably based. On remand, the Board held that that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the party's motive for bringing it, so that only lawsuits which are "both objectively and subjectively baseless" are unlawful. *BE & K Construction Co.*, 351 NLRB 451, 458 (2007). However, since *BE & K*

Construction Co., the Board has repeatedly held that the Supreme Court's opinion in that case "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice." *Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 3 (2011); *Plasterers Local 200 (Standard Drywall)*, 357 NLRB No. 179, at p. 3, fn. 7 (2011), enfd. 547 Fed.Appx. 812 (9th Cir. 2013), and 357 NLRB No. 160, at p. 3 (2011), enfd. 547 Fed.Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540, fn. 7 (2005); see also *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

As a result, lawsuits motivated by an illegal objective remain exempt from *Bill Johnson's* and I find, as General Counsel argues, that Respondent violated Section 8(a)(1) of the Act by maintaining language in the Arbitration Agreement and Revised Arbitration Agreement and by enforcing such provisions when it filed its Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration (Jt. Exh. 12).

I find that Respondent's petition to compel had an unlawful objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to maintain and enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity. As a result, Respondent violated Section 8(a)(1) by filing its petition to compel.

In addition, the Board has held that specific actions taken by a party in the context of litigation may have an illegal objective, and therefore violate Section 8(a)(1), even if the underlying lawsuit itself does not. In particular, the Board has held that discovery requests which seek information regarding employees' participation in union activity have an illegal objective, and therefore violate Section 8(a)(1). *See Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 1, 3 ("discovery requests" seeking the names of employees who had joined the union had an illegal objective and therefore violated Section 8(a)(1)); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (discovery request seeking the identities of employees who signed collective bargaining authorizations unlawful).

I find that Respondent's petition to compel in the instant case had an illegal objective in that it was an attempt to enforce the unlawful arbitration agreements. It is well-settled, as discussed in the *Bill Johnson's* opinion, that lawsuits which attempt to enforce contract provisions and policies which violate the Act constitute independent statutory violations. *Bill Johnson's Restaurants*, 461 U.S. at 737-738, fn. 5, citing *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enf. denied, 446 F.2d 369 (1st Cir. 1971), rev'd., 409 U.S. 213 (1972) and *Booster Lodge No. 405*, 185 NLRB 380, 385 (1970), enfd., 459 F.2d 1143 (D.C. Cir. 1972), aff'd., 412 U.S. 84 (1973) (noting that the Court had "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act"); see also *Regional Construction Corp.*, 333 NLRB 313, 319 (2001) (illegal objective in "cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act"). The Respondent's petition to compel constituted an effort to enforce the Arbitration Agreement and Revised Arbitration Agreement which, for the reasons discussed above, violates Section 8(a)(1) of the Act. The filing of the petition to compel consequently violated Section 8(a)(1).

Moreover, the petition to compel violated Section 8(a)(1) as an attempt to directly prevent employees from engaging in activity protected by Section 7. The Board has repeatedly found that lawsuits designed to prevent employees' Section 7 activity have an illegal objective, and therefore violate Section 8(a)(1). For example, in *Federal Security, Inc.*, 359 NLRB No. 1, at p. 13-14 (2012), the Board determined that a lawsuit alleging that employees engaged in abuse

of process and malicious prosecution by filing an unfair labor practice charge and providing evidence to the Board had the illegal objective of seeking to punish and deter access to Board processes, activity protected by Section 7. See also *Manno Electric*, 321 NLRB 278, fn. 5,295-298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (lawsuit alleging that employees' made "false" statements in "bad faith" to the Board had illegal objective and therefore violated Section 8(a)(1)); and *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union grievance premised upon an interpretation of its collective bargaining agreement which would violate Section 8(e) of the Act had an illegal objective).

Here, the petition to compel, in that it sought dismissal of the employees' class or collective claims, attempted to directly interfere with employee' activity protected by Section 7. As the Board explained in *D.R. Horton*, 357 NLRB No. 184, at p. 3, collective efforts to address workplace grievances through arbitration and litigation constitute protected concerted activity, and thus "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." The petition to compel in the instant case, by urging the state court to dismiss the employees' class or collective claims, sought to directly prevent them from engaging in activity protected under Section 7. The petition to compel therefore had an illegal objective, and the Respondent's filing of the petition to compel and motion to dismiss the class claims violated Section 8(a)(1) on this basis as well.[9]

For all of the foregoing reasons, I find that Respondent's Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration had an unlawful objective and therefore violated Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent, SolarCity Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through class or collective action.

3. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe prohibits or restricts their right to engage in protected activity and/or to file charges with the National Labor Relations Board.

4. The Respondent violated Section 8(a)(1) of the Act by filing a petition Superior Court of the State of California in Case No. CIV 525975 to compel arbitration and dismissal of the Charging Party's collective and class claims.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[9] Inasmuch as I find that the Respondent's petition to compel had an unlawful objective, I also find, contrary to the Respondent's arguments, that this instant case do not violate the Respondent's First Amendment right to defend itself in the collective class action and should not be stayed pending the outcome of the class action litigation.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent maintained a mandatory arbitration policy, the Arbitration Agreement and the Revised Arbitration Agreement, which requires that employees waive their right to pursue class or collective action claims in any forum, whether arbitral or judicial, and may be reasonably interpreted as prohibiting or restricting employees from filing unfair labor practice charges with the National Labor Relations Board. I therefore recommend that the Respondent be ordered to rescind the arbitration agreements and to provide the employees with specific notification that the Arbitration Agreement and Revised Arbitration Agreement have been rescinded.

I shall recommend that the Respondent be ordered to alternatively revise the Arbitration Agreement and Revised Arbitration Agreement to clarify that they do not constitute a waiver in all forums of the employees' right to maintain employment-related class or collective claims, and does not restrict employees' right to file unfair labor practice charges with the National Labor Relations Board, and to notify the employees of the revised agreements, including providing the employees with a copy of the revised agreements. I will recommend that the Respondent post a notice in all locations where the Arbitration Agreement and Revised Arbitration Agreement were utilized. *D.R. Horton, Inc.*, 357 NLRB No. 184 at p. 13; *U-Haul Co. of California*, 347 NLRB at 375, fn. 2; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part, 475 F.3d 369 (D.C.Cir. 2007).

I shall further recommend that the Respondent notify the State Court that it has rescinded or revised the mandatory Arbitration Agreement and Revised Arbitration Agreement and to inform the court that it no longer opposes the plaintiff's claims on the basis of the arbitration agreements. This action is necessary to fully remedy the violation, because the petition to compel had an illegal objective and was therefore unlawful from its inception, and should never have been filed. *Manno Electric*, 321 NLRB at 297-298. The Board has in previous cases ordered respondents to take such specific actions to remedy the effects of having prosecuted lawsuits engendered by an illegal objective, or otherwise unlawful pursuant to *Bill Johnson's* and related cases. *Cellular Sales, 362 NLRB No. 27* fn. 6; *Federal Security, Inc.*, 359 NLRB No. 1, at p. 13-14 (respondent ordered to withdraw or seek to dismiss lawsuit filed with an illegal objective, and have default orders vacated).

Consistent with the Board's decision in *Murphy Oil* and *Cellular Sales, 362 NLRB No. 27 at fn 6*, I shall also recommend that the Respondent reimburse the Charging Party for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful petition to compel individual arbitration in the collective action. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n makewhole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[10]

ORDER

Respondent, SolarCity Corporation, a Delaware corporation with office and principal place of business in San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreements that require employees, as a condition of employment, to waive their right to pursue class or collective claims in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration agreements that employees would reasonably believe bars or restricts employees' rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(c) Filing a petition to enforce its Arbitration Agreement and Revised Arbitration Agreement to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with the Respondent on a class or collective basis in any forum.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory and binding arbitration agreements in all of its forms, or revise them in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial, and that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign the arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, notify the Superior Court of the State of California in Case No. CIV 525975 that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss Anita Irving's collective action and to compel individual arbitration of her claim, and inform the court that it no longer opposes the action on the basis of the arbitration agreements.

(d) In the manner set forth in this decision, reimburse Anita Irving for any reasonable

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's petition to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all its locations in California where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. March 31, 2015

Kenneth W. Chu
Administrative Law Judge

[11] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory and binding arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory and binding Arbitration Agreement and Revised Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreements do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the mandatory Arbitration Agreement and the Revised Arbitration Agreement in all of its forms that the arbitration agreements have been revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which Anita Beth Irving filed her collective wage claim that we have rescinded or revised the mandatory Arbitration Agreement and Revised Arbitration Agreement upon which we based our petition to dismiss her collective wage claim and compel individual arbitration, and

WE WILL inform the court that we no longer oppose Anita Beth Irving's collective claim on the basis of that agreement.

WE WILL reimburse Anita Beth Irving for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

SolarCity Corporation
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board
1301 Clay Street, #300N
Oakland, CA 94612-5224
Hours: 8:30 a.m. to 5 p.m.
510-637-3300

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-128085 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3253.